SUPREME COURT

FILED
DEC 11 1967
JOHN F. DAVIS, CLERK

No. 770

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

AMERADA PETROLEUM CORPORATION, *Petitioner*

v.

BETTYE M. MARSHALL, *Respondent*

Petitioner's Reply to Respondent's Memorandum in Opposition to Petition For Writ of Certiorari

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December 8, 1967

Fort Worth Brief Printing Co., 610 S. Jennings Street Phone ED 2-4070

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Respondent's opposition brief strays far beyond the Record, indulging in repeated self-serving declarations having nothing whatever to do with the issue of whether this Court, in the exercise of its responsibility for supervising the Federal Judiciary, ought to issue the writ of certiorari prayed for in order to maintain the viability of the Federal Declaratory Judgment Act. Reluctantly, petitioner is compelled to comment on respondent's more grievous departures.

MRS. MARSHALL'S IRRELEVANT DEPARTURES FROM THE RECORD

Mrs. Marshall claims something her assignor and co-assignee have both agreed no one is entitled to. (R. 78). Three companies made a contract with her assignor and she asserts that their obligations thereunder were joint, (Opp. Br. 2), citing the Record

herein (R. 6). But the Record (R. 6) shows the contract cited was between the companies *only* and the "joint" undertaking referred to had nothing to do with obligations to Mrs. Marshall's assignor. Company obligations to her assignor were in fact *several* as the *applicable* contract clearly shows (R. 25). Similarly, the implication that Amerada is somehow involved in Mrs. Marshall's lawsuit against the other companies (Opp. Br. 4) is without foundation. The assertion that Mrs. Marshall "believed" Amerada would "voluntarily appear" in her lawsuit against other companies (Opp. Br. 4) reflects wishful thinking rather than belief founded on fact. Amerada has never been a party to Mrs. Marshall's other lawsuit and has given her no reason whatever to "believe" it would relinquish its independent defense and voluntarily submit itself to the jurisdiction of a forum with which it has no connection, and which was obviously selected solely for the convenience of Mrs. Marshall's Washington, D.C. counsel.

With inappropriate resort to vitriolics, the opposition brief complains of "attacks" against Mrs. Marshall which have "raged" in the District of Columbia for "a year and a half" (Opp. Br. 15) by parties not even involved in this lawsuit. Amerada's independent exercise of a right given by law in filing its declaratory action after two years of unfulfilled threats is described as a "calculated tactic" (Opp. Br. 15). The inference is made that the District Court below found Amerada guilty of a "misuse of the declaratory procedure" (Opp. Br. 17). Yet that inference is incon-

ceivable from reading the District Court's opinion (R. 25).

Intemperate suggestions of corporate abuse of judicial process are equally unfounded. Not a scintilla of evidence exists within (or without) the Record to indicate otherwise. It must be recalled that it is *Mrs. Marshall* who determined to split the claim, which she now insists is joint, by suing two companies and just perpetuating her *threats* against the third. Had she really been concerned with ordinary, prompt prosecution of those claims, that action could have been instituted against all three companies in her resident city of Houston, Texas. If she had unified her claims in a logical forum, a decision on the merits would in all probability have been reached. For reasons of her own, however, she sought a hearing far from home where she has no interests whatever, well knowing that in doing so only *two* companies could be joined (R. 96). With that determination, *she* split her claims and is alone responsible for having two lawsuits instead of one.

After being deliberately excluded from litigation threatened in 1964, Amerada waited until 1966 for some action to be taken. Hearing nothing, it resolved to establish its nonliability (R. 81) and filed its declaratory action in the only forum available to it . . . Mrs. Marshall's resident city of Houston, Texas. The opposition brief pretends this is an impertinence, characterizing the exercise of a legal *right* in the only possible forum as a "jump to a court as far removed from the pending ligitation, in terms of contract and

convenience, as could be imagined" (Opp. Br. 6). Of course, there was *no* "pending litigation" against Amerada, which is precisely why the declaratory action was brought; and the extraordinary language of the opposition brief really amounts to an assertion that Amerada had no right to do *anything* but await the pleasure of respondent. Indeed Mrs. Marshall faults Amerada because when it did move to settle the dispute Amerada had "never before complained that it was injured by an undetermined claim against it, nor sought declaratory remedies" (Opp. Br. 14). What does this confused, irrelevant language mean; and what place has it in this Court?

Perhaps the most perplexing irrelevancy posed by respondent is the inflammatory charge that Amerada "ran to the home town of Continental Oil (not its own)" (Opp. Br. 16) to file its declaratory action . . . when in fact Amerada did nothing but attempt to put Mrs. Marshall to a proof in the *only* forum open to it, which happened to be *her* "home town".

Finally, Mrs. Marshall is a knowledgeable litigant. The wife of a highly successful attorney-oil man (R. 79) and a former business woman of many years experience in the oil industry, she has characterized herself as a former "key executive" (Opp. Br. 2). For her to demand damages under Rule 56 of this Court as the result of "the multiplicity of forum proceedings" (Opp. Br. 19) which exist only because of the split claim *she* conceived, is no less than incredible. Her complaint of a "massive and unrelenting battle" (Opp. Br. 4) by adversaries having nothing

to do with this lawsuit bears no relation to the reality of the circumstances she fashioned. What Mrs. Marshall pretends to want is for Amerada to pay her expenses in an action in which Amerada is not a party because she is dissatisfied with *her* decision to generate multiplicious harassing litigation. Surely, no one will ever be afforded such preferential treatment by a Federal Court.

THE VIABILITY OF THE DECLARATORY JUDGMENT ACT IS THE REAL ISSUE

Federal declaratory procedure is a creature of reform legislation intended to pierce the rigidity of the old forms of action and provide a vehicle for moving promptly to the substance of a controversy. The contract interpretation dispute involved here is typical of precisely the kind of disagreement for which declaratory relief was intended.

Mrs. Marshall regards the declaratory judgment as a "special" remedy, inferior to her accounting action which she categorizes as a "direct" action (Opp. Br. 14). She advises that her accounting action was found to be "more appropriate" by the District Court (Opp. Br. 2), although in fact her action was considered *equally* capable of deciding the controversy as Amerada's declaratory action (R. 98). Where, as here, a federal declaratory judgment action is prior to an *equally* satisfactory "direct" action between *exactly* the same parties, posing *exactly* the same issues, Amerada maintains that the declaratory action *must* be heard because the judicial discretion not to enter-

tain a declaratory action arises only where parties or issues are different or the Court finds a declaratory action less capable of determining the dispute. Reasonable reflection shows this *must* be the rule, or else the Federal Declaratory Judgment Act is meaningless wherever forum shopping defendants elect to file a later "direct" action, no matter how well founded the prior declaratory action may be. Using such self-serving descriptions as "formal notice and stated purpose to sue" (Opp. Br. 7) Mrs. Marshall advises that her letter of March 8, 1966, prevented Amerada from taking the action it had already embarked upon (R. 81). Her previous letters had threatened legal action, with none forthcoming; but somehow special significance is to be attached to *this* one. The District Court frankly agreed (R. 99) and Amerada respectfully suggests that agreement was erroneous. Probably thousands of such letters are written by lawyers every day. Few mean all that they say, and none have the significance attached by Mrs. Marshall. It is legal action itself, not the threat thereof, which carries the day.

> "A contest begins when the contestants, satisfied no longer with minatory gestures, are at grips with each other in the arena of fight. When the fight is a civil controversy, the arena is the court."[1]

Mrs. Marshall is confident the Federal Declaratory Judgment Act is being uniformly administered without conflict among the Circuits (Opp. Br. 9). The

[1]Cardozo: *Killian v. Metropolitan Life Insurance Company*, 251 N.Y. 44, 166 N.E. 798 (1929).

petition herein makes it clear that such is not the case. One example proves the point.

Fifth Circuit Opinion herein, page 663

"The District Court clearly was vested with discretion in deciding whether to hear the declaratory judgment suit which involves the *same parties and issues* as Mrs. Marshall's action filed in a court of coordinate jurisdiction." (Emphasis supplied).

[Significantly, the above Fifth Circuit view is immediately followed by citations of *Public Affairs Associates, Inc. v. Rickover*, 369 U.S. 111 (1962), and *Brillhart v. Excess Insurance Company*, 316 U.S. 491 (1942), *neither of which are in point* as shown in the petition herein page 10].

Seventh Circuit Opinion, *Martin v. Graybar Electric Company*, 266 F.2d 202 (7th Cir. 1959)

"Thus two facts were self-evident and undisputed when Martin filed his motion for injunction: a) there were two actions between the *same parties* involving *identical issues* pending at the same time in two United States District Courts, and b) this action was filed *first* and was pending when Graybar filed its suit in Iowa." (Emphasis supplied).

* * *

"As [no unusual circumstance] appears in this record, we believe with what would seem to be the established general rule that the party filing later in time should be *enjoined* from further prosecution of his suit." (Emphasis supplied).

* * *

"The reasons for the general rule are 'just as valid when applied to a situation where one suit precedes the other by a day as they are in a case where a year intervenes between the suits.'"

Mrs. Marshall advises this Court the Seventh Circuit does not conflict with the Fifth as shown in *Graybar* above. Citing the earlier case of *Chicago Furniture Forwarding Company v. Bowles*, 161 F.2d 411 (7th Cir. 1947), she correctly extracts language

restating the fact that discretion exists to hear declaratory actions. With that bland statement we agree. However, after advising this Court that *Bowles* is "precisely in point" (Opp. Br. 10) she neglects to show that *Bowles* involved two consolidated actions *in the same court* . . . the declaratory elements of which were dismissed because *moot!*

The court below held that, notwithstanding the identity of issues and parties, there was **no duty to proceed to adjudicate the issues** in the earlier declaratory suit because the jurisdiction of the district court under the Declaratory Judgment Act is discretionary. In direct conflict is the following holding of the Third Circuit in *Crosley Corporation v. Westinghouse Electric and Manufacturing Company*, 130 F.2d 474, 475 (3rd Cir. 1942), cert.den. 317 U.S. 681 (1942):

> "Since the court below took jurisdiction of the declaratory suit before the infringement suits were filed in the district court in Ohio, even though but one day intervened, it **became its duty to proceed to adjudicate the issues** between the parties and meanwhile to enjoin them from proceeding further in the Ohio suits. We do not *overlook* the fact that the jurisdiction of the district court under the Declaratory Judgment Act, 28 U.S.C.A. § 400, is *discretionary*. Brillhart v. Excess Ins. Co. of America, 1942, 62 S.Ct. 1173, 86 L.Ed. ..... However, this is a legal discretion which must not be exercised arbitrarily but rather in accordance with fixed principles of law."

The opposition brief (pp. 9-10) would leave the impression that this Court's opinion in *Kerotest Manufacturing Company v. C-O-Two Fire Equipment Co.*, 342 U.S. 180 (1952) somehow obviates this striking conflict among the Circuits on the right to be heard under the Federal Declaratory Judgment Act. The opposition brief argues (p. 9):

> "In *Kerotest*, the Supreme Court affirmed the dismissal of the declaratory judgment proceeding. It did so despite the fact that the declaratory action, like Amerada's here, was instituted prior to the date of joinder of the declaratory plaintiff as a defendant in the direct suit."

The statement is literally true but misleading unless read with great care. The fact is that, unlike our case, the claimant's action for patent infringement was filed in Illinois on January 17, 1950, three months *prior* to the filing of the declaratory judgment action in Delaware on March 9, 1950. It is true that the plaintiff in the declaratory judgment action was not made a defendant in the first case until after the declaratory judgment action had been filed. But the holding of the Court was that, since that party was at all times subject to the jurisdiction of the first court and since only the first court had jurisdiction over all of the parties involved in the litigation, it was proper for the first action to take precedence over the *subsequently* filed declaratory judgment suit. In contrast the case at bar presents the situation of a declaratory judgment action which was filed first and which is sought to be defeated by

a subsequent countersuit involving identical issues and identical—not additional—parties. In fact *Kerotest* expressly negatives Mrs. Marshall's main theme that, as the claimant, she has a paramount right to choose the forum. This Court said:

> "The manufacturer who is charged with infringing a patent cannot stretch the Federal Declaratory Judgment Act to give him a *paramount* right to choose the forum for trying out questions of infringement and validity. *He is given an equal start in the race to the courthouse, not a headstart.*"

Finally the opposition brief would attempt to justify the refusal to hear the declaratory suit on the ground of *forum non conveniens*. Curiously Mrs. Marshall seeks comfort in an argument made, not by Amerada but by Continental and Marathon, in her District of Columbia litigation against them. She reasons (Opp. Br. 4):

> " * * * the two oil company defendants in the District of Columbia for dismissal or removal of the case on the ground of *forum non conveniens* (R. 47), and primarily for its transfer to the Southern District of New York."

Of far more pertinence are Mrs. Marshall's *own* concessions in *her* brief in that District of Columbia suit:

> "Plaintiff's claim and its attendant transactions and circumstances have *no* neat, parochial locus." (p. 38).

> " * * * in the circumstances of this case, there is no locale which is, factually or legally, persuasive of the forum to be selected, * * * ." (p. 14).
>
> "*Geographically New York is farther from plaintiff*, Continental and Marathon than is the District of Columbia. It is no more accessible by plane, train or motor vehicle. The bulk of the witnesses and records would be beyond the reach of the process of the court." (p. 16).

But the conclusive answer to this argument is that the doctrine of *forum non conveniens* can, as a matter of law, have no application here because the only forum available for the declaratory judgment action was the one where it was filed. This Court's decision in *Hoffman v. Blaski*, 363 U.S. 335 (1960) settled the earlier conflict and authoritatively established the proposition that the *forum non conveniens* transfer statute is applicable only if the action could originally have been brought in a different jurisdiction. It is equally settled law that the common law doctrine of *forum non conveniens* has application only where the party filing the suit had a *choice* of forum. *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 506 (1946).

The Federal Declaratory Judgment Act is an important statute. On the calendar of judicial time it is still relatively new. Its uniform application is extremely important to effective judicial administration. The conflict among the Circuits upon the right to be heard, in a situation where the declaratory defendant files a countersuit involving the *same issues*

and the *same parties* but in a *different* forum, ought to be resolved by an authoritative decision of this Court.

Respectfully submitted,

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December 8, 1967